IN THE

Supreme Court of the United States

October Term, 1973

No. 72-1061

WINDWARD SHIPPING (LONDON) LIMITED, *et al.*,
Petitioners,

v.

AMERICAN RADIO ASSOCIATION, AFL-CIO, *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

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Respondents seek to distinguish the case at bar from *Benz* v. *Compania Naviera Hidalgo*, 353 U. S. 138 (1957) and *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U. S. 24 (1963) on the ground that the picketing here was neither in aid of a shipboard dispute nor in aid of efforts to represent foreign seamen. They argue on the basis of *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co.*, 397 U. S. 195 (1970) that so-called "area standards" picketing to protest allegedly substandard wages is protected or arguably protected by Section 7 of the Labor Act, 29 U. S. C. §157.

At pages 15-17 the Brief for the Petitioners points out that any doubt remaining after *Benz* and *Incres* about the status of so-called "area standards" picketing directed at foreign ships was removed by *Ariadne*. The issue in

Ariadne was whether the Labor Act "pre-empts state jurisdiction to enjoin peaceful picketing protesting substandard wages paid by foreign-flag vessels to American longshoremen working in American ports." 397 U. S. at 196.

In seeking to resolve this issue, this Court described the determinative test as follows: "The critical inquiry then is whether the longshore activities of such American residents [the longshoremen] were within the 'maritime operations of foreign-flag ships' which *McCulloch* [v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963)], *Incres*, and *Benz* found to be beyond the scope of the Act." *Id.* at 200. Applying this test the court held in *Ariadne* that state court jurisdiction to enjoin picketing in a dispute centering on the wages of longshoremen performing shoreside work was pre-empted. The opinion of the Court distinguished this picketing from picketing in a dispute directed at the wages of seamen doing shipboard work and left open the question of whether picketing in a dispute concerning shoreside work carried out entirely by crew members pursuant to foreign ship's articles would be governed by the Labor Act. *Id.* at 199, 200.

The test for determining whether state jurisdiction over "area standards" picketing of foreign-flag ships is preempted was thus clearly stated in *Ariadne*. Applying this test to the case at bar, the "critical inquiry" is whether the activities of the employees whose wages were the subject of Respondents' picketing were within the maritime operations of foreign-flag ships. The picketing here was to protest allegedly substandard wages of foreign crews serving under foreign articles on foreign-flag ships, and, as it had nothing to do with the carrying on of any shoreside activities by these crews (the question left open by *Ariadne*), the answer to the inquiry is clear. The dispute relates to activities within the maritime oper-

ations of foreign-flag ships and is thus not governed by the Labor Act.

Respondents cite *Marine Cooks and Stewards* v. *Panama S. S. Co.*, 362 U. S. 365 (1960), for the proposition that the dispute in the case a bar is "domestic" and that it therefore comes within the jurisdiction of the NLRB. As we pointed out at pages 18-20 of our Petition for a Writ of Certiorari, *Marine Cooks* was concerned solely with whether federal courts have jurisdiction to grant injunctions in spite of the prohibitions of the Norris-LaGuardia Act, 29 U. S. C. §101 et seq. It was not concerned with the applicability of the Labor Act. While there is dictum in footnote 12 of *Marine Cooks*, 362 U. S. at 371 n. 12, which characterizes the dispute in that case as domestic, this characterization has no bearing on the applicability of the Labor Act.* The determinative test of Labor Act applicability in cases involving "area standards" picketing is set forth in the later *Ariadne* case.

The *amicus* brief filed on behalf of the American Federation of Labor and Congress of Industrial Organizations seeks on pages 8-12 to draw an analogy between the issue at bar and "area standards" picketing of a domestic employer excluded from the coverage of the Labor Act by that Act's definition of employer, 29 U. S. C. §152 (2). We do not believe that such an analogy is apt, for other considerations may apply where both parties are subject to domestic regulation of their labor affairs than are present in the instant case where international considerations are an important factor. In any event, we would not accept the contention at page 9 of the *amicus* brief that there are "a variety of situations" in which a labor

* If such a characterization were relevant to the applicability of the Labor Act, we would respectfully submit that a dispute between the owner of a foreign-flag ship engaged in international trade and an American union over allegedly substandard wages of the ship's foreign crew is international as regards the parties to the dispute and foreign as regards the subject matter of the dispute.

dispute between an excluded domestic employer and a union of covered employees is governed by the Labor Act. The only situations where this holds true are those in which the dispute is "in no way concerned with [the excluded employer's] labor policy," *Teamsters Union* v. *New York, N. H. & H. R. Co.*, 350 U. S. 155, 160 (1956).

Certainly *NLRB* v. *Peter C. K. Swiss Choc. Co.*, 130 F. 2d 503 (2d Cir. 1942), noted at pages 10-11 of the *amicus* brief, does not support the conclusion for which it is cited, namely, that the protections of Section 7 apply to concerted activity directed against an excluded employer. That case involved the dismissal of an employee for publishing an article critical of his employer who was an "employer" within the meaning of the Labor Act.

Finally, as urged at pages 17-27 of the Brief for the Petitioners, we believe that it is not for the NLRB to determine the question whether unions should have a federally protected right to bar foreign shipping from our shores because their crews are paid less than American crews. The existence of a right with such significant consequences to our national economy and to our relations with foreign nations should not be implied in the absence of specific Congressional direction.

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Respectfully submitted,

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